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Supreme Court of the United States

OCTOBER TERM, 1944

No. 574

THE STATE OF ALABAMA AND PUBLIC SERVICE COMMISSION, THE STATE OF TENNESSEE and the RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, COMMONWEALTH OF KENTUCKY AND RAILROAD COMMISSION OF KENTUCKY, ... Appellants

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and FRED M. VINSON, Economic Stabilization Director, by Chester Bowles, Price Administrator, et al.

Appeal from the District Court of the United States for the Western District of Kentucky.

BRIEF FOR APPELLANTS, COMMONWEALTH OF KENTUCKY AND RAILROAD COMMISSION OF KENTUCKY.

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March 28, 1945.

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vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANTS, COMMONWEALTH OF KENTUCKY AND RAILROAD COMMISSION OF KENTUCKY.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States District Court for the Western District of Kentucky, entitled *State of Ala-*

bama v. *United States*, which is here under review, is reported in 56 Fed. Supp. 478. (R. 1345-1362.)

The opinion of the Interstate Commerce Commission, entitled *Alabama Intrastate Fares* (and related cases), which was under review in the lower Court, is reported in 258 I. C. C. 133. (R. 4-47.)

II.

JURISDICTION.

The jurisdiction of this Court is specifically invoked under U. S. C. Title 28, Section 47a (Judicial Code, Section 210). Other statutes pertinent to the jurisdiction of this Court are U. S. C. Title 28, Sections 47, 41 (28), 44 and 345 (Judicial Code, Section 238).

The three cases in the Court below were consolidated for trial and tried as one action and disposed of by a single written opinion and by a single judgment. A single appeal of the three cases from that judgment of the Court is prosecuted under Rule 74 of the Rules of Civil Procedure for the District Courts of the United States, and in conformity with the opinions of this Court in the cases of *First National Bank* v. *Louisiana Tax Commission*, 289 U. S. 60, 62; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 405, 406; and *United States* v. *Pan American Petroleum Corporation*, 304 U. S. 156, 157.

The decree of the District Court for the Western District of Kentucky was entered August 3, 1944. (R. 1362-1363.) An appeal to this Court was allowed September 1, 1944. (R. 1373-1374.) The original record of the Court below was filed in this Court September 25, 1944, under an order of the District Court dated September 1, 1944. (R. 1375.) The case was docketed October 9, 1944, and probable jurisdiction was noted by this Court on November 13, 1944. (R. 1393-1394.)

III.

QUESTION PRESENTED.

The question presented by these appellants is whether the order of the Interstate Commerce Commission, which authorized and required certain railroads operating within Kentucky to make substantial increases, generally 33 1/3 per cent, in their Kentucky intrastate passenger coach fares, effective August 15, 1944, constitutes an unwarranted and unjustified invasion of the sovereignty of the Commonwealth of Kentucky in that it exceeds the powers granted to the Federal Congress by the Commerce Clause of Section 8 of Article I of the Constitution of the United States, and whether said order contravenes the Fifth and Tenth Amendments of said Constitution.

IV.

STATUTES INVOLVED.

A proper interpretation of the statutes listed below is important to the determination of the question presented herein:

Section 13 (3) of the Interstate Commerce Act; U. S. C. Title 49, Section 13 (3).

Section 13 (4) of the Interstate Commerce Act; U. S. C. Title 49, Section 13 (4).

Section 15a of the Interstate Commerce Act; U. S. C. Title 49, Section 15a.

Section 1 of the Inflation Control Act of 1942; U. S. C. Supp. III, Title 50, Section 961.

These statutes are printed in full in the Appendix of this brief.

V.

STATEMENT OF THE CASE.

1—History of Southern Passenger Fares

During World War I and the period following immediately thereafter the railroads of the United States were in dire need of increased revenues in order to operate and maintain their properties efficiently. To provide these additional revenues the Director General of Railroads and the Interstate Commerce Commission authorized substantial increases in their rates, fares and charges. As a result of these authorizations the basic passenger fare reached its peak of 3.6 cents per passenger mile on August 26, 1920. *Increased Rates, 1920.* 58 I. C. C. 220, *et seq.*

That high fare; together with the advent of private and common carrier motor transportation, caused a drastic decline in railroad passenger traffic, beginning about 1926. To meet this situation many railroads, particularly in the south and west, experimented with lower fares over various sections of their lines and for varying periods of time. These experiments culminated in the establishment of a basic coach fare of 1.5 cents per passenger mile, both interstate and intrastate, effective December 1, 1933, on most of the railroads operating in Southern Passenger Association Territory. Somewhat higher fares, however, were charged by these railroads for travel in pullman and parlor cars. At the same time other railroads in other sections of the country were charging fares which varied greatly and ranged upward to the peak first established in 1920. (R. 1143-1144.)

The chaotic condition then existing with respect to passenger fares caused the Interstate Commerce Commission in 1935 to institute its first general investigation of these matters under its Docket 26550. In its report in that docket, *Passenger Fares and Surcharges*, 214 I. C. C. 174, decided February 28, 1936, the Commission found that the interstate fares then being charged were, and for the future

would be, unreasonable to the extent that they exceeded 2 cents per passenger mile in coaches, and 3 cents per passenger mile in pullman and parlor cars. The Commission further found at page 257 of that report that the interstate coach fares then being charged by most southern railroads, including some operating in Kentucky, of 1.5 cents per passenger mile, were not unreasonable, or otherwise unlawful. (R. 1148.)

Pursuant to the latter finding, the southern railroads continued to charge 1.5 cents per passenger mile up to and including February 9, 1942, except for a period of fourteen months from November 15, 1937 to January 14, 1939, inclusive, during which the maximum fare of 2 cents, prescribed in *Passenger Fares and Surcharges, supra*, was maintained. (R. 1148.)

Immediately following the entrance of the United States into World War II in December, 1941, the Class I railroads petitioned the Interstate Commerce Commission for authority to make general increases in their rates, fares and charges. The increases were said to be necessary to take care of general wage increases granted in the Fall of 1941, and also increases in costs of materials and supplies, which had already occurred, and which were expected as a result of our being engaged in war activities. In response to these petitions the Commission promptly instituted an investigation under its Docket *Ex Parte 148, Increased Railroad Rates, Fares and Charges, 1942*, 248 I. C. C. 545, decided March 2, 1942. By an order issued during the course of the investigation the Commission approved that portion of the carriers' request which sought increases of 10 per cent in the *existing* interstate passenger fares and charges, and said increases became effective February 10, 1942. By a corresponding order the Railroad Commission of Kentucky granted like increases on Kentucky intrastate traffic and said increases also became effective February 10, 1942. As a result of these authorizations by the Federal

and State regulatory bodies the basic coach fares on most Kentucky railroads became 1.65 cents per passenger mile on February 10, 1942, instead of 1.5 cents theretofore applicable.

The increases in passenger fares thus sought and obtained by the Class I carriers of the nation were estimated by them to provide additional revenues to the extent of $45,000,000 based on the traffic volume of 1941. (248 I. C. C. 545,608.)

Notwithstanding they were accorded the full measure of increases sought in their interstate and intrastate passenger fares, that both their freight and passenger traffic had shown a tremendous increase in volume by reason of World War II, and, because of the price control program instituted early in 1942 by the Federal Government, increases in costs of their materials and supplies had not occurred to the extent anticipated, the southern railroads on July 14, 1942, petitioned the Interstate Commerce Commission for a further increase in their interstate coach fares from 1.65 cents to 2.2 cents per passenger mile, equivalent to 33 1/3 per cent. This petition was in the form of a request that the proceeding known as *Passenger Fares and Surcharges, supra*, be reopened, and the findings and orders therein modified to permit the filing of tariffs, which would provide for the increases sought. Copies of the petition were served on the parties to that proceeding. No hearing was held and the petition was denied by an order dated August 1, 1942. Coincident with that action, however, the Commission reopened *Ex Parte 148, Increased Railway Rates, Fares and Charges, 1942*, and, by a *pro forma* order, without any hearing whatsoever, granted the southern railroads permission to publish tariffs which would increase their interstate passenger coach fares from 1.65 to 2.2 cents per passenger mile. Said tariffs were published and were permitted to become effective October 1, 1942, even though the Commission was petitioned by the Office of Price Administration to suspend the in-

creases contained therein pending an investigation and hearing as to their lawfulness. (R. 1145-1146.)

It is important to observe that the order of the Interstate Commerce Commission of August 1, 1942, permitting the tariffs carrying increased fares to be filed, was issued under *Ex Parte 148*, without notice to the parties to that proceeding, and notwithstanding the fact that the petitions of the carriers in that proceeding did not seek any increases in their passenger fares, other than the general increase of 10 per cent in the fares *existing* at the time the petitions were filed, which increases had previously been approved and made effective February 10, 1942. These appellants were not parties either to *Ex Parte 148*, or to *Passenger Fares and Surcharges, supra*, and therefore were not accorded an opportunity to protest against the issuance of the Commission's order of August 1, 1942.

It should also be noted that the increases in the interstate southern coach fares became effective October 1, 1942, or one day prior to the enactment on October 2, 1942 of the Inflation Control Act of 1942, U. S. C. Supp. III, Title 50, Section 961, which provides, *inter alia*, for the stabilization of prices, wages and salaries affecting the cost of living, and for certain procedures to be observed in connection with general increases in the rates and charges of common carriers.

2—History of the Proceedings

In so far as the Kentucky fares are involved, this proceeding had its genesis in the filing of tariff schedules with the Railroad Commission of Kentucky providing for increases in the Kentucky intrastate passenger coach fares to become effective December 1, 1942. Under these schedules the basic one-way fares, which had been 1.5 cents per passenger mile prior to February 10, 1942, and 1.65 cents thereafter, were to be increased to 2.2 cents per passenger mile. Such increases amounted generally to 33 1/3 per cent, or more than $500,000 per annum.

Upon protests from various interested parties, including the Office of Price Administration, the Kentucky Commission suspended the operation of the schedules pending a hearing and investigation as to their lawfulness. Said hearing was held by the Kentucky Commission at its offices in Frankfort, May 14, 1943, and in its report, dated May 31, 1943, that Commission found that the suspended schedules had not been shown to be just and reasonable. The Commission thereupon entered an order directing their cancellation. (R. 1062-1063.)

Shortly thereafter the Interstate Commerce Commission, in response to a petition of the Kentucky railroads, dated June 24, 1943, instituted an investigation under Docket 29000, *Kentucky Intrastate Fares*, to determine whether the refusal of the Kentucky Commission to authorize or permit increases in the Kentucky intrastate passenger coach fares caused any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce. (R. 1141.)

Hearings were held in Docket 29000, *Kentucky Intrastate Fares*, before Examiner C. E. Stiles of the Interstate Commerce Commission at Frankfort, Ky., on September 8 and 9, 1943, at which evidence was taken and a transcript of the testimony and record was made. (R. 1140.)

In due course, that is, on or about December 15, 1943, Examiner Stiles issued his proposed report wherein he recommended that the Commission find that the Kentucky intrastate fares then in effect did not cause any undue or unreasonable advantage, preference or prejudice as between persons or localities in interstate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce. The Examiner

also recommended the entry of an order discontinuing the proceeding. (R. 1077-1094.) Exceptions to the examiner's report were filed by the Kentucky railroads and reply was made by counsel for the Kentucky state authorities and other interveners.

Docket 29000, *Kentucky Intrastate Fares*, was assigned for oral argument before the Interstate Commerce Commission at Washington, February 18, 1944, at which time the Commission also heard arguments in three similar but separate proceedings involving the intrastate passenger fares in Alabama, Tennessee and North Carolina. The four cases were disposed of by a single report, dated March 25, 1944, and entitled *Alabama Intrastate Fares* (and related cases), 258 I. C. C. 135. In that report the Commission, with Commissioners Aitchison, Mahaffie and Splawn dissenting, set aside the findings of the Examiner and, in lieu thereof, found that the Kentucky intrastate passenger coach fares caused, and in the future would cause, undue and unreasonable advantage to, and preference of, persons in intrastate commerce, undue and unreasonable disadvantage to, and prejudice against, persons in interstate commerce, and undue, unreasonable, and unjust discrimination against interstate commerce. The Commission found further that such unlawfulness should be removed by increasing the Kentucky intrastate fares to the level of the corresponding interstate fares contemporaneously maintained by the Kentucky railroads to, from, and through Kentucky. (R. 38.) A corrected order, dated May 8, 1944, was issued, authorizing and requiring increases in the Kentucky fares effective July 1, 1944. (R. 1-3.) Subsequently, the effective date of the order was postponed to August 15, 1944. The Interstate Commerce Commission made no finding with respect to undue prejudice against interstate localities.

On June 12, 1944, these appellants filed their petition in the District Court of the United States for the Western

District of Kentucky, bearing Civil Action 708, wherein they sought temporary and permanent injunctions restraining the enforcement, operation and execution of said corrected order of the Interstate Commerce Commission, dated May 8, 1944, and asked that said order be set aside and annulled.

Pursuant to U. S. C. Title 28, Section 47, a Three-Judge District Court, composed of Honorable Elwood Hamilton, Circuit Judge, and Honorable Shackelford Miller, and Honorable Mac Swinford, District Judges, was convened and a hearing before said District Court was held at Louisville, Ky., July 17 and 18, 1944. At the same time and place the said District Court also held hearings in Civil Action 706, *The State of Alabama and Public Service Commission* v. *United States of America and Interstate Commerce Commission*, and Civil Action 707, *The State of Tennessee and the Railroad and Public Utilities Commission of the State of Tennessee* v. *United States of America and Interstate Commerce Commission*, involving similar issues with respect to the intrastate passenger fares in Alabama and Tennessee, respectively. (R. 544-545.)

The District Court in an opinion by Judge Miller, dated August 3, 1944, and reported in 56 Fed. Supp. 478, sustained generally the findings and order of the Interstate Commerce Commission. At page 487 of its opinion the Court referred to that portion of the Commission's findings wherein it was held that the intrastate fares caused undue and unreasonable disadvantage and prejudice of interstate passengers, and said that such finding may or may not be sufficiently supported by the evidence but that in view of its approval of the Commission's finding that the intrastate fares caused undue, unreasonable and unjust discrimination against interstate commerce, it was unnecessary to decide that point. (R. 1358.)

The present proceeding is an appeal from the final decree of the District Court made and entered August 3, 1944, in Civil Actions 706, 707 and 708.

VI.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

Appellants, Commonwealth of Kentucky and Railroad Commission of Kentucky, contend:

First, That the findings of the Interstate Commerce Commission in Docket 29000, *Kentucky Intrastate Fares,* are not supported by substantial or any evidence,

Second, That the corrected order of May 8, 1944 based upon said findings of the Interstate Commerce Commission is in contravention of the Fifth and Tenth Amendments of the Federal Constitution and void, and

Third, That the District Court erred in concluding that said findings and order of the Interstate Commerce Commission were supported by substantial evidence, did not involve errors of law, and were not arbitrary or unreasonable.

In particular, appellants contend that the Interstate Commerce Commission, and the Court below, erred in holding there was substantial evidence of record to sustain:

(a) The Commission's Finding No. 1, that the interstate coach fares to, from and through points in Kentucky were just and reasonable,

(b) The Commission's Finding No. 4, that the payment of higher fares by interstate passengers than intrastate passengers traveling in the same trains and generally in the same cars, constituted undue preference of intrastate passengers and undue prejudice of interstate passengers,

(c) The Commission's Finding No. 5, that traffic moving under the lower Kentucky intrastate fares was not contributing its fair share of the revenues required to

enable respondents to render adequate and efficient transportation service, and

(d) The Commission's Finding No. 6, that the maintenance of intrastate passenger coach fares in Kentucky on a lower level than the corresponding interstate fares caused undue preference of persons in intrastate commerce, undue prejudice against persons in interstate commerce, and undue and unreasonable discrimination against interstate commerce.

VII.

SUMMARY OF ARGUMENT

The findings and orders of the Interstate Commerce Commission in its Docket *Ex Parte 148, Increased Railway Rates, Fares and Charges, 1942*, 248 I. C. C. 545, *et seq.*, and the evidence in that proceeding, did not constitute evidence of the reasonableness of the interstate coach fares embraced in its Docket 29900, *Kentucky Intrastate Fares*.

2. The presentation of the history of the interstate and intrastate fares did not constitute evidence of the reasonableness of the interstate fares.

3. The statistical data, and testimony relating to increased operating cost, were unsubstantial, and wholly inadequate to sustain the finding that the Kentucky interstate fares were just and reasonable.

4. The Interstate Commerce Commission was without power to consider the testimony and exhibits of witnesses for the Kentucky railroads as evidence of undue preference of intrastate passengers and undue prejudice against interstate passengers.

5. The payment of higher fares per passenger mile by interstate passengers than by intrastate passengers did not constitute evidence of undue prejudice against the former and undue preference of the latter.

6. The saving clause of the order of the Interstate Commerce Commission is insufficient to support its statewide finding of undue preference of intrastate passengers and undue prejudice against interstate passengers.

7. The findings of the Interstate Commerce Commission of undue preference of intrastate passengers and undue prejudice against interstate passengers are not supported by the opinion of the District Court.

8. A mere showing that an increase in the intrastate fares would cause an increase in the revenue of the carriers is insufficient to sustain a finding of undue discrimination against interstate commerce.

9. A showing that passengers may defeat through interstate fares by combinations of intrastate fares to the border points and interstate fares beyond, without any evidence that such acts have been practiced, does not constitute evidence of undue discriminaton against interstate commerce.

10. The maintenance of lower fares per passenger mile on intrastate traffic than on interstate traffic, even though the two classes of traffic are intermingled, is not evidence that the intrastate traffic fails to pay its fair proportionate share of the cost of maintainng an adequate railway system.

11. A showing of losses on passenger traffic in past years does not constitute evidence of undue discrimination against interstate commerce.

12. The Interstate Commerce Commission and the District Court failed to accord any weight to the stabilization program of the Federal Government.

VIII.

ARGUMENT

A—Preliminary Statement

By Clause (3) of Section 8 of Article I of the Constitution of the United States, commonly called the Commerce Clause, the Federal Congress was given the power: "To regulate commerce with foreign nations and among the several States, and with the Indian tribes." No similar power was delegated to the Federal Government by this, or any other provision of the Federal Constituton, to regulate the internal commerce of the several States, and such power was accordingly reserved to the States by the Tenth Amendment to the Federal Constitution. When the Interstate Commerce Act was originally enacted in 1887, the powers delegated therein to the Interstate Commerce Commission were restricted by Section 1 to interstate and foreign commerce. U. S. C. Title 49, Section 1 (1).

Notwithstanding these provisons of the Federal Constitution and the Interstate Commerce Act, it had been held prior to 1920 that the Interstate Comerce Commission could require increases in intrastate rates, fares, and charges in order to remove unjust discrimination against interstate *persons* or *localities*. *The Shreveport Case, Houston, East and West Texas Railway Co.* v. *United States*, 234 U. S. 342, 58 L. Ed. 1341. The principle enunciated in the *Shreveport Case* respecting the removal of discrimination against interstate persons and localities, through the medium of increases in intrastate rates, fares, and charges, was incorporated in the Transportation Act of 1920, and at the same time the Interstate Commerce Commission was given power to increase intrastate rates, fares, and charges to the extent necessary to r[illegible]e "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." Section 13 (4) of the Interstate Commerce Act, U. S. C. Title 49, Section 13 (4).

These assumptions of power by the Federal Congress and its agency, the Interstate Commerce Commission, to regulate intrastate commerce, were said to be a necessary part of their power to regulate interstate and foreign commerce.

Since its enactment in 1920, Section 13 (4) of the Interstate Commerce Act has been the subject of numerous decisions of this Court, and as a result thereof, it has been consistently held, as stated at page 484 of the opinion of the Court below, that:

> "* * * the power of the Commission to fix intrastate rates is limited to the two situations of (1) where the evidence shows a preference as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, and (2) where the evidence shows any unreasonable or unjust discrimination against interstate commerce. Any attempt on the part of the Intersfate Commerce Commission to regulate intrastate rates where one of these two situations does not exist would be in conflict with the Tenth Amendment to the United States Constitution." (R. 1353).

This Court has also held that a finding that the interstate rates, fares, and charges are just and reasonable, is a prerequisite to a finding by the Commission of unjust discrimination against interstate commerce. This, too, was recognized by the Court below at page 485 of its opinion, wherein it said:

> "Unless that fact [reasonableness of the interstate fares] is first established there is no basis for a finding of discrimination against interstate commerce. Georgia Public Service Commission v. United States, 283 U. S. 765; United States v. Louisiana, 290 U. S. 70." (R. 1355)

In the first *Florida Log Case*, *Florida* v. *United States*, 282 U. S. 194, this Court laid down certain principles which plainly show the limitations of the Interstate Commerce Commission in its regulation of intrastate rates, fares, and charges. For example, at page 211, the Court had the following to say about the relationship of Section 13 (4) to Section 15a of the Interstate Commerce Act:

> "In construing the statute this court has held that the general provision of Sec. 13 (4) prohibiting 'unjust discrimination against interstate commerce' and authorizing the Commission to establish intrastate rates to prevent such discrimination, is to be read in connection with Sec. 15a, both of which were added by the Transportation Act, 1920. [Citations omitted] There is what this court called a 'dovetail relation' between the two provisions. The authority granted by Sec. 13 (4) is thus to be considered in the light of the affirmative duty of the Commission to fix rates and to take other important steps to maintain an adequate national railway system."

And at pages 211 and 212 the Court made the following comment upon the propriety of showing a need for the exercise of federal power:

> "The propriety of the exercise of the authority must be tested by the relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of the state power, the justification of the exercise of the federal power must clearly appear."

With respect to disparities between interstate and intrastate rates, the Court at page 212 said:

> "The Commission has no general authority to regulate intrastate rates and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates."

As to the requirement of essential findings based upon adequate evidence the Court at page 215 said:

> "In the absence of such findings we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

The above excerpts are designed to illustrate the numerous limitations which have been recognized by this Court upon the power of the Federal Government to regulate intrastate commerce, and the extreme care which should be exercised by the Interstate Commerce Commission when it undertakes to invade the reserved powers of the States.

We come now to a consideration of the evidence before the Interstate Commerce Commission, and the Court below, to determine whether the requirements of these limitations have been met, or whether the assailed order of the Commission has been issued in derogation thereof, and therefore in contravention of the Fifth and Tenth Amendments of the Federal Constitution.

B—Reasonableness of Interstate Fares

POINT 1

DECISIONS OF INTERSTATE COMMERCE COMMISSION IN EX PARTE 148 ARE WITHOUT PROBATIVE VALUE

In justification of its finding that the interstate passenger coach fares to, from, and through Kentucky were just and reasonable, the Interstate Commerce Commission referred to its findings and orders in *Ex Parte 148, Increased Railway Rates, Fares and Charges, 1942, supra.* The Court below likewise referred to the findings and orders in *Ex Parte 148* in concluding that the Commission's finding of reasonableness of the interstate fares was supported by substantial evidence. 56 Fed. Supp. 485, 486. (R. 1355-1356)

Ex Parte 148 was instituted by the Commission upon petition of the Class I railroads of the nation for the sole purpose of determining whether the carriers were in need of additional revenues to take care of additional expenses, due to wage increases, and increases in cost of materials and supplies incident to World War II. The proceeding was strictly a "revenue case" and *the reasonableness of individual rates, fares, and charges was not considered.* This is shown by the following excerpt from page 613 of the opinion:

> "Rates and charges increased as herein permitted are not prescribed rates and charges within the meaning of Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U. S. 370."

By their petitions in *Ex Parte 148* the railroads asked for an increase of 10 per cent in their then existing interstate passengers fares and charges. This portion of their petitions was granted in full during the course of the investigation by an order of the Interstate Commerce Com-

mission, dated January 21, 1942, and was subsequently affirmed at page 609 of the Commission's opinion of March 2, 1942. A like increase of 10 per cent in the Kentucky intrastate fares was approved by an appropriate order of the Railroad Commission of Kentucky. Under these orders, both the interstate and intrastate passenger coach fares to, from, and within Kentucky, on most southern railroads were increased from 1.5 to 1.65 per passenger mile on February 10, 1942.

By a supplemental order in *Ex Parte 148*, dated August 1, 1942, the Interstate Commerce Commission authorized the southern railroads to file tariffs providing for increases in their interstate passenger coach fares from 1.65 to 2.2 cents, effective October 1, 1942, and it subsequently declined to suspend these increases pending a hearing and investigation as to their lawfulness, even though requested to do so by the Office of Price Administration. The order of the Commission authorizing the filing of tariffs carrying the increased interstate passenger coach fares was issued *without the holding of a hearing thereon, and without any evidence respecting the reasonableness of said increased fares having been presented* at any of the hearings in *Ex Parte 148*. As a matter of fact, the original petitions of the railroads in *Ex Parte 148* only sought increases of 10 per cent in the existing fares, that is, an increase in these particular fares from 1.5 to 1.65 cents per passenger mile. Furthermore, the order of August 1, 1942 was not founded upon a petition of the railroads in Ex Parte 148, but presumably upon a petition filed by them in a separate proceeding, namely, *Passenger Fares and Surcharges, supra.*

From the above it is clear that prior to the submission of Docket 29000, *Kentucky Intrastate Fares*, on February 18, 1944, the Interstate Commerce Commission had not ap-

proved, or considered, in any formal proceeding, the reasonableness of the increases in southern interstate passenger coach fares from 1.65 to 2.2 cents. On the contrary, in the proceeding known as *Passenger Fares and Surcharges, supra*, that Commission at page 257 had specifically found that the fares then being maintained on this traffic, namely 1.5 cents per passenger mile, were not unreasonable or otherwise unlawful. The only modification of this finding prior to the submission of Docket 29000, *Kentucky Intrastate Fares*, was the increase from 1.5 to 1.65 cents per passenger mile approved by the Commission in *Ex Parte 148*.

It thus follows that the reasonableness of the interstate passenger coach fares to, from, and through Kentucky can not be sustained by the Commission's findings and orders in *Ex Parte 148*.

A still further infirmity of the reliance on *Ex Parte 148* to sustain the reasonableness of the interstate passenger coach fares to, from, and through Kentucky, is the fact that none of the evidence introduced at the hearings in *Ex Parte 148* was incorporated in the record in Docket 29000, *Kentucky Intrastate Fares*, as provided by Rule 82 of the General Rules of Practice of the Interstate Commerce Commission. It is well established that nothing can be treated as evidence which is not introduced as such. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91, 93; *United States* v. *Abilene & S. R. Co.*, 265 U. S. 269, 288.

To complete the record it should be mentioned that neither of these appellants, Commonwealth of Kentucky and Railroad Commission of Kentucky, was a party to either *Passenger Fares and Surcharges, supra*, or *Ex Parte 148*.

POINT 2

STATEMENT OF HISTORY OF INTERSTATE FARES DOES NOT ESTABLISH THEIR REASONABLENESS

In further support of its conclusion that the Commission's finding of reasonableness of the interstate fares was supported by substantial evidence, the Court below said at page 485 of its opinion: "The Commission had before it evidence showing the history of both interstate and intrastate fares * * *." (R. 1355)

A statement of the history of any rate or fare is always desirable and helpful to a proper understanding of the issues involved, but the mere presentation of such history in nowise establishes whether the rate or fare is reasonable or unreasonable. For example, in the present case, the history showed that the basic southern interstate passenger coach fares had ranged from 1.5 cents to 3.6 cents during the period beginning prior to World War I and extending to the date of the hearings in Docket 29000, *Kentucky Intrastate Fares.* In *Passenger Fares and Surcharges, supra,* decided in 1936, when passenger traffic and operating ratios were much less favorable to the railroads than at the time of the hearing in *Kentucky Intrastate Fares* in September 1943, the Interstate Commerce Commission found that the interstate passenger coach fares of the nation should not exceed 2 cents per passenger mile. It also found in that proceeding that the fare of 1.5 cents then being charged by the southern railroads was not unreasonable or otherwise unlawful.

The history further showed that prior to October 1, 1942 the southern railroads voluntarily maintained on both

interstate and intrastate traffic the following fares in coaches:

Period	*Fare per Mile*
December 1, 1933 to November 14, 1937	1.5 cents
November 15, 1937 to January 14, 1939	2.0 cents
January 15, 1939 to February 9, 1942	1.5 cents
February 10, 1942 to September 30, 1942	1.65 cents

The Interstate Commerce Commission and the Courts have frequently held that the long maintenance of a given rate is *prima facie* evidence of its reasonableness. *Export and Domestic Rates*, 8 I. C. C. 214; *Rates on Bananas from Gulf Ports*, 30 I. C. C. 510; *Louisville & N. R. Co.* v. *Kentucky Railroad Commission*, 214 Fed. 465, affirmed, *Louisville & N. R. Co.* v. *Finn*, 235 U. S. 601.

Appellants submit that if any weight whatsoever is to be accorded the history of the interstate and intrastate fares, such evidence fully sustains the finding and order of the Railroad Commission of Kentucky, dated May 31, 1943, wherein it was held that the rate of 1.65 cents then being maintained on Kentucky intrastate traffic was not unreasonable or otherwise unlawful, and that the fare of 2.2 cents then proposed by the railroads had not been shown to be just and reasonable. In any event, they submit that the mere presentation of the history of the interstate and intrastate fares does not establish the reasonableness of the interstate fare of 2.2 cents under the conditions prevailing in September 1943.

POINT 3

STATISTICAL DATA AND EVIDENCE OF INCREASED OPERATING COSTS WERE INADEQUATE TO SUSTAIN REASONABLENESS OF INTERSTATE FARES

The only remaining evidence of record mentioned by the Court below as tending to support the Commission's finding of reasonableness of the interstate fares is to be found at page 485 of its opinion, wherein it was stated that the Commission had before it "statistical data with respect to the principal railroads operating in Alabama, Tennessee and Kentucky", and at page 486 wherein it was stated that the investigations and conclusions in *Ex Parte 148* "were supplemented with current statistical data and evidence of increased operating costs largely attributable to war-time conditions." The latter statement was qualified by the following sentence: "It is true that the same war-time conditions have greatly increased the revenues of the carriers, but it has been with resulting unusual wear and tear on equipment." (R. 1357)

An increase in passenger traffic over that prevailing prior to World War II has long been the dream of railroad officials. Even a moderate increase, they contended, would take them out of the "red" and place passenger traffic on a paying basis. This situation is exemplified by the following excerpt from page 182 of *Passenger Fares and Surcharges, supra*,:

> "The heavy inroads upon the passenger business of railways resulting, among other things, from the competition of automobiles and motor busses have affected unfavorably the unit costs of the traffic remaining on the rails, and *if the volume of rail passenger traffic can be increased* the unit cost will decline when computed in the manner in which the 1933 cost was computed. Thus, an increase of only 0.79 passenger in the aver-

age car occupancy for 1933 of 11.2 in the eastern district would have been sufficient, the average passenger-mile revenue and average journey remaining the same, to eliminate the entire passenger deficit of $11,500,400 for 1933 in that district." (Emphasis supplied)

Having obtained increases in their rail passenger traffic which border on the sensational, the railroads at the hearing in *Kentucky Intrastate Fares* lamented that such increases resulted in increases in their operating costs and in wear and tear on their equipment. Some increases in costs and some wear and tear were inevitable, but in the absence of a showing that these costs were out of proportion to the increased revenues flowing from the increased volume of traffic, no significance whatsoever should be attached to them. Such showing was not made, and obviously could not be made, by the railroads.

The statistical data presented at the hearing showed, for example, that the five principal railroads of Kentucky enjoyed the following increases in their interstate and intrastate Kentucky operations for the years shown. (R. 1076)

	1937	*1938*	*1942*
Passenger revenues	$5,086,532	$4,318,238	$14,023,436
Passenger miles (thousands)	279,255	208,349	723,909
Average passengers per car-mile	11.5	9.1	22.3

From the above it will be observed that these Kentucky railroads were handling about three times as much passenger traffic in Kentucky in 1942 as in 1937 and that during this period the number of passengers per car, including parlor cars and pullmans, had just about doubled. That this increase in traffic was not attended by corresponding increases in costs, is demonstrated by the decrease in passenger operating ratios for the seven railroads upon whose petition *Kentucky Intrastate Fares, supra*, was in-

stituted. (R. 1289). As stated by witness Tassin (R. 1208), the operating ratio is obtained by dividing the operating revenue into the operating expenses.

The less favorable showing for 1938 than for 1937 was caused by the increase in the basic coach fares from 1.5 to 2.0 cents per passenger mile on November 15, 1937. Because of this less favorable showing the 1.5-cent fare was restored January 15, 1939.

Notwithstanding the tremendous increases in traffic and revenues recorded by the Kentucky railroads in 1942 over 1397, still further increases occurred in the first half of 1943, the latest period for which statistics were available at the time of the hearing in September 1943. The following are illustrative: (R. 1311, 1312, 1314, 1317, 1316)

Total Operations of 7 Kentucky Railroads	*First six months*	
	1942	*1943*
Freight revenues	$328,971,432	$393,358,095
Passenger revenues	$ 37,617,828	$ 83,550,668
Total operating revenues	$365,967,329	$502,695,431
*Net railway operating income	$ 66,457,303	$ 78,241,371
Operating ratio	64.5	56.9

* After payment of federal income and excess profits taxes.

In the light of such showing these appellants submit that the Court below erred in concluding that the Interstate Commerce Commission's finding of reasonableness of the interstate fares was sustained by the statistical data before it, or by the increase in the operating costs of the railroads.

C—Undue Discrimination Against Interstate Passengers

POINT 1

INTERSTATE COMMERCE COMMISSION WAS WITHOUT POWER TO CONSIDER TESTIMONY OF RAILROAD WITNESSES AS EVIDENCE OF DISCRIMINATION AGAINST INTERSTATE PASSENGERS.

The six specific findings of the Interstate Commerce Commission are set forth at page 482 of the opinion of the Court below. (R. 1349, 1350.) The finding of undue preference of intrastate passengers and undue prejudice of interstate passengers appears in a somewhat indirect form in Finding 4, and is repeated in a more direct form in Finding 6.

Before analyzing the testimony presented to the Commission in support of this finding appellants desire to emphasize that it came entirely from employee witnesses of the railroads. Appellants submit that such testimony was not competent and that the Commission was without power to consider same as evidence of discrimination against interstate passengers.

By Section 13 (2) of the Interstate Commerce Act, U. S. C. Title 49, Section 13 (2) the Interstate Commerce Commission is empowered to institute an inquiry, "on its own motion", concerning any matter or thing of which complaint may be made. Docket 29000, *Kentucky Intrastate Fares*, was not such a proceeding but was an investigation instituted upon a petition of the carriers, dated June 24, 1943, as provided by Section 13 (3) of the Interstate Commerce Act, U. S. C. Title 49, Section 13 (3). Mention is made of this fact to show that the Commission did not have before it any complaint of any interstate passenger of any discrimination being practiced against him. (R. 1141.)

These appellants do not go so far as to say that if, after the proceeding had been instituted, an interstate passenger

had intervened and submitted evidence of discrimination caused by the lower intrastate fares, that such evidence would not have been competent. But they do say that in the absence of any complaint, intervention, or evidence by or on behalf of any interstate passenger, the Commission was without power to treat as evidence of discrimination against interstate passengers, any testimony of witnesses for the railroads, all of whom were their own employees.

The impropriety of treating such testimony as evidence of discrimination against interstate passengers has heretofore been recognized by the Commission in *Passenger Fares and Charges in Georgia*, 214 I. C. C. 567, wherein at pages 570 and 571, it said:

> "*Persons and localities*—No person or locality here complains that the Georgia intrastate fares cause undue preference or prejudice.
>
> * * * * * * *
>
> Evidence to sustain a finding that intrastate rates or fares are violative of Section 13, in that they unduly prejudice persons and places, must be of equal dignity and probative value as the evidence necessary to sustain a finding under Section 3. Barrett Co. v. Atchison, T. & S. F. Ry. Co., 172 I. C. C. 319, 333. The evidence here presented does not meet this requirement."

POINT 2

PAYMENT OF HIGHER FARES PER MILE BY INTERSTATE PASSENGERS WAS NOT EVIDENCE OF UNDUE DISCRIMINATION AGAINST THEM:

At the hearing in *Kentucky Intrastate Fares*, *supra*, the railroad witnesses introduced various exhibits tending to show that the Kentucky intrastate coach fares were lower per passenger mile than the interstate fares to, from,

and through Kentucky. Such exhibits were wholly inadequate to support the findings of undue preference of intrastate passengers or undue prejudice of interstate passengers, even though the transportation conditions affecting the two types of service may have been substantially similar. This is demonstrated by the excerpt heretofore quoted from page 212 of *Florida* v. *United States*, 282 U. S. 194, namely: "* * * the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates."

This principle is particularly apposite in the case at bar because there was no evidence of discrimination against interstate passengers, and no interstate passenger complained of discrimination caused by the difference in fares. It was fully recognized by the Commission itself in *Passenger Fares and Charges in Georgia, supra*, wherein at pages 570 and 571, it said:

> "Respondents carry both interstate and intrastate passengers on the same trains, with the same service and accommodations. The intrastate passengers pay 2 cents per mile in pullman cars and ride on the same train and in the same cars with the interstate passengers who pay one-way fares of 3 cents, 6-month round-trip fares of 2.5 cents, and 15-day round-trip fares of 2 cents. In day coaches both interstate and intrastate travelers pay the same fares. This, respondents allege, constitutes undue prejudice to and preference of persons and undue discrimination against persons traveling in interstate commerce.
>
> * * * * * *
>
> We have no general authority to regulate intrastate rates or fares, and a mere disparity between those applicable interstate and intrastate does not warrant us in prescribing intrastate rates or fares. Florida v. United States, supra."

In the *Georgia Case* the intrastate fares of 2 cents per passenger mile in pullman cars were found not unlawful, that is, not unduly discriminatory against interstate persons, interstate localities, or interstate commerce. The Commission reached this conclusion notwithstanding the fact that the Georgia intrastate fares bore a lower ratio to the interstate fares, namely, 2 to 3, than do the Kentucky intrastate fares here under consideration, which ratio is 1.5 to 2.

POINT 3

SAVING CLAUSE OF COMMISSION'S ORDER IS INSUFFICIENT TO SUPPORT STATEWIDE FINDING OF DISCRIMINATION AGAINST INTERSTATE PASSENGERS.

In *Railroad Comm. of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, competent evidence was presented to show undue preference of intrastate passengers and undue prejudice against interstate passengers at certain border points. With respect to such evidence, this Court at page 580 said:

> "We cannot sustain the sweep of the order in this case on the showing of discrimination against persons or places alone."

As heretofore shown, no competent evidence was presented in *Kentucky Intrastate Fares, supra*, to support a finding of discrimination against interstate passengers even at the border points. Under the principle laid down in the *Wisconsin Case, supra*, it follows that the saving clause inserted in the Commission's order is insufficient to support its statewide finding of undue preference of intrastate passengers and undue prejudice against interstate passengers.

POINT 4

COMMISSION'S FINDINGS OF UNDUE DISCRIMINATION AGAINST INTERSTATE PASSENGERS ARE NOT SUSTAINED BY OPINION OF COURT BELOW

At page 487 of its opinion, (R. 1358, 1359) the Court below said:

> "That part of finding No. 4 which states that the payment by interstate passengers of a higher fare than is paid by the intrastate passengers is to the undue and unreasonable disadvantage and prejudice of the interstate passengers may or may not be sufficiently supported by the evidence to justify its finding, but in view of finding No. 6, hereinbelow referred to, it becomes unnecessary to decide that point.
>
> * * * * * * *
>
> "The existence of such discrimination against interstate commerce, regardless of the non-existence of any advantage as between persons or localities is sufficient justification for the Commission to end the disparity by ordering it removed."

It is clear from the above excerpts that the District Court refrained from passing upon the question of whether the finding by the Interstate Commerce Commission of undue discrimination against interstate commerce was supported by adequate evidence.

Premises considered, appellants submit that the Court below erred in its formal finding of Fact No. 6, which reads as follows:

> "6. The said findings of the Interstate Commerce Commission in Alabama Intrastate Fares No. 28963 [and related cases] are supported by substantial evidence." (R. 1343)

The findings of the Commission mentioned in the District Court's Finding No. 6, included the findings of undue discrimination against interstate passengers, with respect to which the Court in its opinion declined to say were supported by adequate evidence.

D—Undue Discrimination Against Interstate Commerce

POINT 1

MERE SHOWING THAT AN INCREASE IN INTRASTATE FARES TO LEVEL OF INTERSTATE FARES WOULD PRODUCE INCREASED REVENUES FOR CARRIERS DOES NOT CONSTITUTE EVIDENCE OF UNDUE DISCRIMINATION AGAINST INTERSTATE COMMERCE

In support of its conclusions that the Interstate Commerce Commission's finding of undue, unreasonable and unjust discrimination against interstate commerce, the Court below at page 487 of its opinion, (R. 1358) said in part as follows:

> "The evidence showed that the disparity in rates causes the railroads' revenues to be substantially less than they would be if the intrastate rates were increased to the interstate rate level, * * *."

These appellants admit that the Kentucky intrastate passenger coach fares were lower than the corresponding interstate fares to, from, and through Kentucky, and it may be that the raising of the intrastate fares to the level of the interstate fares would accord the railroads some additional revenues. They submit, however, that these findings alone do not constitute evidence that the intrastate fares discriminate against interstate commerce. Appellants make this contention with full knowledge of the statement of this Court in *Florida* v. *United States*, 282 U. S. 194, namely,

"The raising of rates does not necessarily increase revenue." This Court has repeatedly held that there is a "dovetail relationship" between that part of Section 13 (4) of the Interstate Commerce Act dealing with undue discrimination against interstate commerce and Section 15a of that Act. *Railroad Comm. of Wisconsin* v. *Chicago, B. & Q. R. Co., supra.* For this reason an increase in the state rates, unaccompanied by an increase in the revenues of the carriers, would be a vain and useless gesture, in so far as removal of discrimination against interstate commerce is concerned.

Appellants contend, however, that the authority to determine the reasonableness *per se* of the intrastate fares lay with the state authorities, and to justify the Interstate Commerce Commission in the alteration of such fares, it was not enough for the Commission merely to find that the raising of the intrastate fares to the interstate level would produce additional revenues for the carriers. If such findings were sufficient to enable the Interstate Commerce Commission to invade the reserved powers of the state, it would deprive the state authorities of all vestige of control over intrastate rates and fares, unless such rates and fares were equivalent to, or in excess of, the interstate rates and fares. This is so because it is virtually impossible for the state authorities to prove that increased intrastate rates and fares will not result in some increases in the revenues of the carriers.

A careful review of the decisions of the Interstate Commerce Commission and of this Court fails to disclose where either of these tribunals has gone so far as to hold that a mere showing that an increase in intrastate fares would cause an increase in the revenues of the carriers is sufficient to sustain a finding of undue discrimination against interstate commerce.

POINT 2

MERE ABILITY TO DEFEAT INTERSTATE FARES BY USE OF INTRASTATE FARES TO BORDER POINTS IS NOT EVIDENCE OF UNDUE DISCRIMINATION AGAINST INTERSTATE COMMERCE.

In further support of its conclusions that the Interstate Commerce Commission's finding of undue discrimination against interstate commerce is supported by adequate evidence, the Court below at page 487 (1358-1359) said:

> "* * * this disparity [between interstate and intrastate fares] is such that passengers destined to points outside the respective states were encouraged to purchase intrastate tickets to points near the state line, and then either buy tickets or pay cash for the remainder of the journey, thus, using the lower intrastate fare to defeat the higher interstate fare."

It is true that the employee witnesses of the Kentucky railroads testified that it was *possible* for the through interstate fares to be reduced by combinations of intrastate fares to the border line and interstate fares beyond. These witnesses, however, did not testify that such practices had been indulged in. Only three witnesses, namely, Aiken, Tucker and Tolleson, testified with respect to this subject. When questioned by counsel for the Kentucky interests as to whether he had personal knowledge of these alleged practices, witness Aiken said:

> "I have not encountered it individually." (R. 1153.)

On further cross-examination this same witness testified as follows:

> "I don't know anything about it definitely and it is only hearsay as far as I am concerned." (R. 1162.)

Witness Tucker on cross-examination testified as shown below:

> "Q. Personally, you don't know whether it is being done or not, do you?
> A. We do not, no." (R. 1174.)

Witness Tolleson was also asked about his knowledge of such alleged practices, and in response said:

> "Frankly, I don't know of any happening of that particular kind." (R. 1191.)

From the above it is clear that there is no testimony in this record that through interstate coach fares were being defeated by the lower Kentucky intrastate fares. Furthermore, such practices would have been illegal under the findings of this Court in *Baltimore & O. S. W. R. Co.* v. *Settle*, 260 U. S. 166. In the case just cited it was held that an interstate shipper could not lawfully defeat a through interstate rate by a combination of interstate and intrastate rates, even though the shipment was stopped enroute at the border point and reshipped from there under a separate bill of lading.

The Interstate Commerce Act condemns actual discrimination, not imaginary or unproven discrimination.

POINT 3

MAINTENANCE OF LOWER FARE INTRASTATE THAN INTERSTATE, EVEN THOUGH THE TWO CLASSES OF TRAFFIC ARE INTERMINGLED, IS NOT EVIDENCE THAT INTRASTATE TRAFFIC FAILS TO PAY ITS FAIR PROPORTIONATE SHARE OF COST OF MAINTAINING ADEQUATE RAILWAY SYSTEM.

In still further support of its conclusion that the finding of the Interstate Commerce Commission of undue dis-

crimination against interstate commerce was sustained by adequate evidence, the lower Court at page 487 of its opinion (R. 1359) said:

> "The two classes of traffic are inextricably intermingled; the same railways and the same cars carry both passengers; the same men operate the train in its intrastate journey and in its interstate journey. Under such conditions the effect of maintaining a materially lower rate intrastate than the reasonable interstate rate necessarily results in intrastate traffic failing to pay a fair proportionate share of the cost, maintenance and operation and is discriminatory against interstate traffic."

These appellants submit that before the Interstate Commerce Commission can make a valid finding that intrastate rates or fares cause discrimination against interstate commerce, it is essential for the evidence to show something more than that the two classes of traffic are handled in the same trains, and sometimes in the same cars, at different rates or fares. A review of the decisions cited by the Court below in support of the above excerpt, and of other decisions of this Court, wherein findings of undue discrimination against interstate commerce have been sustained, discloses that the decisions fall into two general groups. For convenience, the two groups will hereinafter be called "revenue cases" and "cost evidence cases", respectively.

The revenue cases consist of those wherein the Commission, acting under Section 15a of the Interstate Commerce Act, U. S. C. Title 49, Section 15a, has granted general increases in interstate rates or fares to enable the carriers as a whole, or by districts, to maintain and operate their properties efficiently. *Railroad Comm. of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; *State of New York* v. *United States*, 257 U. S. 591; and *United States* v *Louisi-*

ana, 290 U. S. 70, cited by the Court below, fall within this group. The first two, that is, the Wisconsin and New York cases, were the outgrowth of *Increased Rates, 1920*, 58 I. C. C. 220, while the last named, the Louisiana Case, resulted from the *Fifteen Per Cent Case*, 1931, 178 I.C.C. 539, *et seq.* In these cases, the Commission found, and their findings were sustained by this Court, that corresponding increases should be made in the intrastate rates and fares in order that intrastate fares might bear their fair proportionate part of the additional revenues required.

The cost evidence cases consist of those wherein the Commission has found upon *appropriate cost studies*, or *other cost evidence*, that the intrastate rates or fares were so low that they did not produce sufficient revenues to cover the cost of the service and to provide a fair return on the investment. *Florida v. United States*, 292 U. S. 1; and *Illinois Commerce Com. v. United States*, 292 U. S. 474, also cited by the Court below, fall within this second group, as will be shown by the following excerpts:

Florida v. United States, 292 U. S. 1, 9, 10, 11:

"Reviewing the history of the Cummer scale of intrastate rates on logs, and considering comparable interstate and intrastate rates, the Commission found that the Cummer scale was abnormally low and less than reasonably compensatory; that the defendants' revenue under the Cummer scale was 'insufficient under all the circumstances and conditions to cover the full cost of the service.'"

* * * * *

"If the revenues yielded by the Cummer scale are not sufficient to cover the cost of the service, as the *cost study* indicates, it would follow that part of the above amount would constitute a dead loss in net revenue." (Emphasis supplied).

Illinois Commerce Comm. v. *United States*, 292 U. S. 474, 484:

"But as we have already said it was for the Commission to determine whether the *cost study* was adequate or whether it was necessary to refine or supplement it in order to make it dependable evidence for the purpose of rate making. The study itself afforded evidence of the reasonableness of the rate fixed, and upon the whole record there was abundant support for the Commission's finding, which was carefully and thoroughly considered in its report." (Emphasis supplied).

The case at bar does not come within the scope of either of the groups described above. It is not a "revenue case" because it is not a situation where the State Commission declined to authorize increases in intrastate fares equal to those approved by the Interstate Commerce Commission under Section 15a. In *Ex Parte 148*, the Interstate Commerce Commission authorized an increase of 10 per cent in *existing* passenger fares to become effective February 10, 1942, but a like increase was also approved by the Railroad Commission of Kentucky effective on the same date.

The Kentucky railroads not only did not show any need of additional revenues but made no effort to do so. On the contrary, the record is plain that they are not in need of such revenues. This is demonstrated by the following testimony of E. N. Aiken, a principal witness for the Kentucky railroads at the hearing in *Kentucky Intrastate Fares, supra*:

"Q. Briefly why are you asking these increases in Kentucky?

A. To put our fares on an equality with the interstate fares such as we have in other states that we have asked.

* * * * *

Q. Would you go so far as to say that your chief reason for it is the need of additional revenue at the present time?

A. No, I don't think I would say that we are in need of additional revenue at this time." (R. 1160)

If further proof be necessary to show that these railroads are not in need of additional revenues, it is supplied by the following summary of Exhibit 10 (R. 1318, 1319) which shows the rates of return of the seven railroads upon whose petition *Kentucky Intrastate Fares* was instituted:

Year	Investment in Railway Property Including Cash, Materials and Supplies	Net Railway Operating Income	Rate of Return	Rate of Return Before Federal Income Taxes
1938	$2,664,905,079	$ 79,039,428	2.97	Not shown
1939	2,656,160,858	99,860,361	3.76	Not shown
1940	2,673,007,466	104,869,234	3.92	Not shown
1941	2,724,933,244	148,729,567	5.46	6.54
1942	2,758,645,770	167,173,888	6.07	10.84
1943*	2,790,719,290	196,763,666	7.05	17.96

* Estimated.

The above statistics were compiled and introduced in the record by these appellants but they differ but little from corresponding figures presented by the Kentucky railroads as shown by the following summary of Exhibit 19 (R. 1327, 1333)

Year	Investment in Railway Property, including Cash, Materials and Supplies	Net Railway Operating Income	Rate of Return
1938	$2,576,696,392	$ 79,971,549	2.98
1939	2,597,311,288	97,873,528	3.76
1940	2,595,362,091	102,674,183	3.95
1941	2,659,969,968	143,927,839	5.41
1942	2,710,500,486	156,601,762	5.78

The rates of return in both of the above tables were based on valuation shown by the carriers, which failed to accord proper credits for depreciation. If the rates of return had been based upon the 1940 valuations recommended by the Interstate Commerce Commission's Bureau of Valuation, they would have been considerably higher. This is shown by the following excerpt from the dissenting opinion of Commissioner Splawn, in which Commissioners Aitchison and Mahaffie concurred:

> "In my judgment the evidence in these proceedings falls far short of establishing that the failure of respondents to receive the additional revenue, which would result from increasing the present intrastate fares to the interstate level, operates to *interfere with* or *to thwart* the broad purpose of section 15a to maintain an efficient transportation system. Nor can it be said that under present conditions the failure of the State Commissions to permit increases in the present intrastate fares constitutes an obstruction to interstate commerce.
>
> In the Kentucky proceeding, for example, the relation of net railway operating income to investment in railway property including cash, materials, and supplies, for the seven principal respondents shows average rates of return, after deduction of Federal income taxes, as follows: 1938, 2.98 percent; 1939, 3.76 percent; 1940, 3.95 percent; 1941, 5.41 percent; 1942, 5.78 percent. In this connection it is of interest that based on 1940 valuations recommended by our Bureau of Valuation the average rates of return for the respective years indicated would be 4.18 percent, 5.31 percent, 5.57 percent, 7.81 percent, 8.50 percent, and 8.13 percent. The increase in net railway operating income for passenger traffic alone, 1942 over 1941, was $50,992,801 for the 12 class I respondents in the Ala-

bama proceeding, and $29,506,275 for the 7 principal respondents in the Kentucky proceeding." (R. 45-46.)

With respect to the propriety of considering the rates of return before deduction of Federal income taxes, it is sufficient to quote from *Increased Railway Rates, Fares and Charges, 1942*, 248 I.C.C. 545, 556:

> "We may observe that, while taxes have been deducted in stating net railway operating income in the foregoing table, we have held, Reduced Rates, 1922, 68 I.C.C. 676, 683, that
>
> 'railway corporations should, like other corporations, pay their Federal income taxes out of income rather than collect it, in effect, from the public in the form of transportation charges adjusted to enable it (them) to retain the designated fair return over and above the tax'."

The case at bar is not a "cost evidence" case because no cost study or other cost evidence was introduced or offered to show that the basic coach fare of 1.65 cents per passenger mile was insufficient under Section 15a of the Interstate Commerce Act to enable the Kentucky railroads to maintain their properties as adequate railway systems and to pay a fair return on their investments. On the contrary, there was evidence to show that these carriers had voluntarily maintained a basic coach fare of 1.5 cents per passenger mile on both interstate and intrastate traffic for several years subsequent to December 1, 1933, and that the Interstate Commerce Commission had found that this fare was not unreasonable or otherwise unlawful. 214 I.C.C. 174, 257. The evidence further shows that since this finding was made there have been tremendous increases in the freight and passenger revenues of the Kentucky railroads and the gross and net returns thereon.

Having shown that the instant case does not come within the scope of the decisions of this Court, cited by the Court below, in that it is neither a "revenue case" nor a "cost evidence case", appellants submit that the Court below erred in its holding at page 487 of its opinion that the intermingling and handling in the same trains and cars of interstate and intrastate traffic at lower rates or fares for intrastate traffic "necessarily results in intrastate traffic failing to pay a fair proportionate share of the cost, maintenance and operation and is discriminatory against interstate traffic." On the contrary, appellants assert that if this holding is sustained by this Court, it would be equivalent to a finding that a mere showing of a difference in interstate and intrastate rates or fares is sufficient to support a finding that the lower intrastate rates or fares constitute a discrimination against interstate commerce in violation of Section 13 (4) of the Interstate Commerce Act. Such finding, however, would be contra to the holding in *Florida* v. *United States*, 282 U.S. 194, 212, namely:

> "The Commission has no general authority to regulate intrastate rates and *the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates.*" (Emphasis supplied.)

POINT 4

PAST LOSSES ON PASSENGER TRAFFIC DO NOT CONSTITUTE EVIDENCE OF DISCRIMINATION AGAINST INTERSTATE COMMERCE

At page 487 of its opinion the Court below refers to the contention of these appellants that the Kentucky railroads are not in need of additional revenues and then says:

> "But the proposed increased rates are not based on the need for additional revenue. The proposed in-

crease is for the purpose of removing an unjust discrimination against interstate commerce which the Commission is empowered to do regardless of resulting increased revenues or the non-existence of any need for same." (R. 1359.)

No authority was cited by the District Court in support of the conclusion of law stated above. It may be that if the Kentucky railroads had shown by cost studies or other adequate cost evidence that the Kentucky intrastate fares were insufficient to provide for the maintenance of their properties and a reasonable return on their investment, it would not have been essential for the evidence to show that they were in need of additional revenues. In the absence of such showing, however, appellants submit that the above cited conclusion of law is erroneous.

It may be that the District Court itself realized the infirmity of this statement of the law because it immediately undertook to bolster same by referring to alleged losses sustained by the Kentucky railroads on their system operations, both interstate and intrastate, within and without Kentucky, in by-gone years. Two decisions of this Court are cited in support of the District Court's conclusion that these alleged losses should be taken into consideration in determining whether the finding of undue discrimination against interstate commerce by the Interstate Commerce Commission was supported by adequate evidence. Appellants submit, however, that neither of these decisions is relevant to the issues here.

In *Institutional Investors* v. *Chicago, M. St. P. & P. R. Co.*, 318 U.S. 523, certain interests contended that the war earnings of the railroads supported their view that certain junior securities might have some value in the future, although the findings of the Interstate Commerce Commission were to the contrary. This Court held, however, that there was no basis for concluding that these earnings

would be continued for any considerable period of time. In *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, the owners of the stock yards contended that their rates and charges were not unduly high when measured by their operations and income for the depression year of 1932. The Court dismissed this contention and held that in determining rates and charges for the future it was proper for the administrative agency to consider the average earnings for the six-year period from 1927 to 1932, which included both good and bad years.

In the case at bar, it is shown that the Interstate Commerce Commission in 1936 prescribed a maximum coach fare thoughout the United States of 2 cents and had found that the coach fare of 1.5 cents maintained by the southern railroads on their interstate traffic was not unreasonable or otherwise unlawful. The position of these appellants is that if that decision was correct when made, then it is all the more proper to say that the Kentucky intrastate coach fare of 1.65 cents per passenger mile was not unreasonable or otherwise unlawful under the much more favorable conditions prevailing on the Kentucky railroads in 1943. In other words, this is not a case of using war earnings as a basis for reductions in rates under those approved for prewar conditions but it is a case of using these more favorable conditions as additional justification for the finding of lawfulness previously made in 1936.

But irrespective of the propriety of considering past losses in arriving at a rate for the future, appellants submit that under no circumstances should the Kentucky intrastate fares be increased over their pre-war level in order to take care of these alleged pre-war system losses. In *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575, at page 590, this Court said:

> *"But regulation does not insure that the business shall produce net revenues, nor does the Constitution re-*

quire that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned. Galveston Electric Co. v. Galveston, 258 U. S. 388; San Diego Land and Town Co. v. Jasper, 189 U.S. 439, 446." (Emphasis added.)

The above excerpt is applicable to the present case and clearly demonstrates that the Commission can not lawfully permit the carriers to recoup in highly prosperous years of inflated and excessive earnings the losses incurred in former years, by permitting increases in fares, and particularly intrastate fares which have been passed upon by and found lawful by the state regulatory body.

The evidence of record amply demonstrates that under normal conditions the Kentucky carriers were able to show a more favorable financial result under a fare of 1.5 cents than under 2 cents. This is exemplified by their reverting to the 1.5-cent fare on January 15, 1939 after having charged a 2-cent fare for the preceding 14 months. It was also admitted by the carriers' witness Aiken, who testified as follows:

> Q. You mean by that the total revenue produced by the 1 1/2 cent fare was more than the total revenue being produced by the 2 cent fare?
>
> A. Generally speaking I would say that that is correct. (R. 1168)

Appellants submit that since the Kentucky carriers can not maintain a fare of more than 1.5 cents during normal conditions, they should not be permitted to impose a fare of 2.2 cents during the war period when the public is forced to use their services because of war-time restrictions, such as the rationing of gasoline and automobile tires.

E—Stabilization Program of Federal Government

POINT 1

THE INTERSTATE COMMERCE COMMISSION AND COURT BELOW FAILED TO ACCORD ANY WEIGHT TO THE STABILIZATION PROGRAM OF THE FEDERAL GOVERNMENT.

At the time the Kentucky railroads filed tariffs with the Railroad Commission of Kentucky providing for increases in their intrastate passenger coach fares from 1.65 to 2.2 cents per passenger mile, the Emergency Price Control Act of 1942 had been supplemented by the Inflation Control Act of 1943. A copy of Section 1 of the latter act, U. S. C. Supp. III, Title 50, Section 961, is incorporated in the Appendix of this brief. Furthermore, prior to its decision of May 31, 1943 holding that the Kentucky railroads had not shown the proposed increased passenger coach fares to be just and reasonable, the Kentucky Commission had received a copy of the President's Executive Order 9328 of April 3, 1943, Paragraph 4 of which reads as follows:

> "The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program." (R. 1071)

Appellants submit that the Kentucky Commission acted properly in giving due consideration to the Federal stabilization program set out in the documents herein re-

ferred to, in reaching its findings concerning the Kentucky intrastate fares, and that the Interstate Commerce Commission and the District Court erred in not giving weight to this program in their findings of fact and conclusions of law.

Since this point is covered more fully in a brief to be filed by counsel for Office of Price Administration in Docket No. 592, a companion case, it will not be pursued further herein.

CONCLUSION

For the foregoing reasons, these appellants urge that the corrected order of the Interstate Commerce Commission of May 8, 1944, requiring increases in the Kentucky intrastate passenger coach fares, be held void and in contravention of the Fifth and Tenth Amendments of the Federal Constitution; that the decree of the District Court be reversed, with directions to that Court to enter a decree, permanently enjoining the enforcement, operation and execution of said corrected order of the Interstate Commerce Commission.

Respectfully submitted,

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Dated at
Frankfort, Ky.
March 28, 1945.

APPENDIX

Section 13 (3) of Interstate Commerce Act, U. S. C. Title 49, Section 13 (3).

Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, service, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this title.

Section 13 (4) of Interstate Commerce Act, U. S. C. Title 49, Section 13 (4).

Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the

one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 15a of Interstate Commerce Act, U. S. C. Title 49, Section 15a.

(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other facts, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Section 1 of the Inflation Control Act of 1942, U. S. C. Supp. III, Title 50, Section 961.

In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices,

wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: Provided, that no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.